No. 89-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF FLORIDA,

Petitioner,

—v.—

TERRANCE BOSTICK,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE SUPREME COURT OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF FLORIDA, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of individual liberty embodied in the Bill of Rights. The ACLU of Florida is one of its statewide affiliates.

Since its founding 70 years ago, the ACLU has consistently opposed recurrent efforts to whittle away the traditional protections of the Fourth Amendment in the alleged pursuit of more effective law enforcement. The pressures generated by the war against drugs have once again brought that debate into sharp focus. This case involves the constitutionality of a bus interdiction program. In a larger sense, however, it involves the fundamental premise of the Fourth Amendment -- namely, the right of the people to be free from random searches and seizures by government officials. That right was essential to the framers and is essential to the basic organizational premises of the ACLU.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia nonprofit corporation with a nationwide membership of more than 5,000 lawyers. NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers. The Florida Association of Criminal Defense Lawyers (FACDL) is a state affiliate of NACDL with a statewide membership consisting of hundreds of criminal defense attorneys.

Among NACDL's and FACDL's stated objectives is the promotion of the proper administration of justice. Consequently, NACDL and FACDL are concerned with

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

the protection of individual rights and the improvement of the criminal law, its practices and procedures. Those organizational goals are directly implicated in this case. In particular, NACDL and FACDL believe that the position taken by petitioner in this case cannot be accepted without seriously eroding the basic constitutional safeguards of the Fourth Amendment.

STATEMENT OF THE CASE

This case involves the search of a bus passenger's luggage without probable cause or reasonable suspicion. It was not a coincidental encounter. Rather, it was part of a deliberate and increasingly popular strategy adopted by police officers in Broward County and elsewhere.

As part of that strategy, the officers in this case boarded an interstate bus bound from Miami to Atlanta during a layover in Fort Lauderdale.[2] They were armed and wearing "raid jackets" that clearly identified them as law enforcement officers. The defendant was sitting in the back of the bus and had not done anything to arouse the officers' suspicion. Nevertheless, he was approached and asked to produce his ticket and identification. He complied with the request and it is undisputed that both his ticket and identification were in proper order. The police then asked for "permission" to search the defendant's bag. The officer who made this request was standing in the aisle. Believing he had no choice, defendant acceded to the search, which led to his eventual arrest.

Prior to trial, defendant moved to suppress the fruits of the search as a violation of the Fourth Amendment. The government's position, then and now, was that the defendant had "consented" to the search and

[2] The statement of facts set forth in this brief is adopted from the opinion of the Florida Supreme Court. *Florida v. Bostick*, 554 So.2d 1153 (1989).

thereby waived his Fourth Amendment rights. This contention was emphatically rejected by the Florida Supreme Court, which ruled that defendant had been "seized" for Fourth Amendment purposes and that any subsequent "consent" was tainted and invalid. In explaining the basis for its ruling, the Florida Supreme Court concluded:

> Under such circumstances a reasonable traveler would not have felt that he was "free to leave" or that he was "free to disregard the questions and walk away." There was, in fact, no place to which a reasonable traveler might leave and no place to which he or she might walk away. The fact that the officers partially blocked the aisle and that one appeared to carry a gun only underscore this conclusion . . . For all intent and purposes, Bostick was detained by the activities of Officers Nutt and Rubino. Although this did not rise to the level of an "arrest," it nevertheless constituted a lesser form of "seizure" of Bostick's person.

554 So.2d at 1157 (citations omitted).

SUMMARY OF ARGUMENT

The issue in this case is whether the Fourth Amendment permits police to board interstate buses with neither probable cause nor reasonable suspicion and then, having "seized" the bus passengers, attempt to elicit their "consent" to a search of their luggage. According to petitioner, any objections to this practice should be dis-

missed as trivial. In fact, it is petitioner's expansive view of police authority that threatens to trivialize the fundamental values of individual security and personal privacy embodied in the Fourth Amendment.

The question of whether a Fourth Amendment seizure has taken place turns on whether the average person would feel free to leave an encounter with the police. Here, the defendant was confronted by armed police officers wearing "raid jackets" who stood in the aisle of the bus and by their very presence blocked his only means of egress. Under the circumstances, it was hardly unreasonable for the defendant to believe that he had no choice but to remain where he was. His subsequent "consent" to the search of his luggage did not eliminate the taint of the illegal seizure. To the contrary, the "consent" was a direct product of the illegal seizure and thus null and void.

Based on these facts, the Florida Supreme Court properly ruled that the fruits of the search could not be introduced in evidence. This Court, however, can and should go further. In particular, *amici* urge this Court to adopt a prophylactic rule barring the sort of bus interdictions revealed by this record. This request rests on several considerations. First, bus interdictions are an increasingly common law enforcement strategy. Second, they affect large numbers of people, the vast majority of whom are entirely innocent of any wrongdoing. Third, they are inherently standardless and thereby permit, if not encourage, discriminatory law enforcement. Fourth, they are both ineffective and unnecessary.

Amici do not question the sincerity or legitimacy of Florida's desire to disrupt the flow of drugs within its borders. As this Court has often stressed, however, that goal must be accomplished through constitutional means. Even in a war against drugs, random attacks against civilians are forbidden. The decision below should, therefore, be affirmed.

ARGUMENT

THE INCREASINGLY COMMON POLICE STRATEGY OF DETAINING BUS PASSENGERS WITHOUT EITHER PROBABLE CAUSE OR REASONABLE SUSPICION CANNOT BE SUSTAINED UNDER THE FOURTH AMENDMENT

A. This Case Is Illustrative Of A Widespread Fourth Amendment Problem

The search and seizure in this case were not the result of an unanticipated street encounter. They were the intended result of a deliberate police strategy. Moreover, that strategy is not confined to Broward County, Florida. To the contrary, the practice of boarding interstate buses and searching their passengers without probable cause or reasonable suspicion is an increasingly common tactic of law enforcement agencies around the country. *See, e.g., United States v. Hammock*, 860 F.2d 390 (11th Cir. 1988); *United States v. Felder*, 732 F.Supp. 204 (D.D.C. 1990); *United States v. Lewis*, 728 F.Supp. 784 (D.D.C. 1990); *United States v. Rembert*, 694 F.Supp. 163 (W.D.N.Car. 1988); *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988)(*en banc*).

The basic pattern of all these searches, as described in the reported cases, is essentially the same. Officers working in groups of two or three board interstate buses while they are stopped en route to pick up and discharge passengers. They wear "raid jackets" whose insignia clearly mark them as police officers and they are armed, though the weapons are generally concealed. They board the buses very near the scheduled departure time, when passengers would risk missing their trips if they tried to leave the bus. They engage in confrontations with passengers, chosen at random, with no limits on the field officers' discretion. They stand in or partly in the narrow aisles, towering over the seated passengers. Making clear that they are part of a drug interdiction

team, the officers ask the chosen passengers their destinations, ask for tickets and identification, and request permission to search luggage. The precise language used in these confrontations varies. It is clear, however, that many passengers accede to these search requests because they feel that they have no other choice.

Because the passengers subject to this procedure are chosen at random, the vast majority will have nothing criminal to hide. Relying on this fact, the Solicitor General dismisses the significance of these searches, asserting that "[a]n innocent person is likely to consent to a request by the police, at least if the request is not unduly burdensome or humiliating." Brief for United States at 15. *Amici* respectfully submit that this self-serving assumption lacks any empirical basis in fact.[3] The Solicitor General's position also implicitly undervalues the important privacy interests at stake. The carry-on luggage of many passengers is likely to contain toiletries, undergarments, and other intimate items that are intensely private, though perfectly legal. The compelled exposure of such items to police gaze is not an insignificant intrusion. As Justice Steven has observed: "Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions." *Michigan Dep't of State Police v. Sitz*, 496 U.S. ___, ___, 110 S.Ct. 2481, 2493 (1990)(Stevens, J., dissenting).

[3] There is substantial evidence that most encounters between citizens and identified police officers involve felt coercion. *See* Maclin, "The Decline of the Right of Locomotion: The Fourth Amendment On the Street," 75 Cornell L.Rev. 1258, 1301-03 (1990)(and sources cited therein). Commonsense suggests that the level of apprehension and perceived coercion is substantially higher for most people in the confined spaces of a bus. Moreover, even if some citizens might be willing to allow such searches, "[t]he Fourth Amendment . . . is designed to protect the more sensitive among us, provided only that their expectations be reasonable." Schulhofer, "On the Fourth Amendment Rights of the Law-Abiding Public," 1989 Sup.Ct.Rev. 87, 154.

The Fourth Amendment issues in this case cannot, therefore, be dismissed as trivial. They certainly do not seem or feel trivial to the bus passenger confronted by the looming presence of a police officer flashing a badge and possibly a weapon. Indeed, what the Florida Supreme Court aptly described as "the Sheriff's Department's standard procedure of 'working the buses,'" 554 So.2d at 1156, is closely analogous to the highway patrol practices that this Court condemned in *Delaware v. Prouse*, 440 U.S. 648 (1979).

The Court's language in *Prouse* is equally relevant here:

> To insist neither upon an appropriate factual basis for suspicion directed at a particular [passenger] nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ."

Id. at 661, *quoting Terry v. Ohio*, 392 U.S. 1, 22 (1968). It would, in addition, substitute "the petty tyranny of unregulated rummagers," Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn.L.Rev. 349, 411 (1974), for the principled safeguards of the Fourth Amendment.

B. The Bus Interdiction Programs Typified By This Case Represent A "Seizure" For Fourth Amendment Purposes

The test of when a police-citizen confrontation is a "seizure" subject to Fourth Amendment limitations is now well settled. A person has been "seized" within the meaning of the Fourth Amendment if "the officer, by

means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Terry v. Ohio*, 392 U.S. at 19 n.16. That judgment, in turn, depends on whether, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988), *quoting United States v. Mendenhall*, 446 U.S. 544, 554 (1980)(opinion of Stewart, J.).

Ordinarily, the question is quite fact-specific, intended to "assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation," *Mendenhall*, 446 U.S. at 573. The factors common to bus stops, however -- including the partial or complete blocking of the aisle, the imminent departure of the bus, and the inability of the ordinary person to ignore a known police officer who is directing questions at him or her -- are such that a reasonable passenger will not feel free to leave. Because those common factors create the felt coercion, all such confrontations are properly deemed seizures and subject to Fourth Amendment controls. Most crucially, the passenger is physically inhibited from leaving the bus. Even if that were not true, however, leaving the bus is not a realistic alternative for most passengers since it means abandoning one's scheduled travel plans. *See Florida v. Royer*, 460 U.S. 491, 501 (1983)(defendant "was effectively seized" when the police "retain[ed] his ticket and driver's license").

As this Court has recognized, "the setting in which the conduct occurs" is crucial to determining whether there has been a Fourth Amendment seizure. *Chesternut*, 486 U.S. at 573. The geography of a bus makes it entirely different from a street or an airport terminal.[4]

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[4] It is also radically different than the design of a factory. The ability (continued...)

Bus aisles are exceedingly narrow; one judge found that the aisles of a series 2000 Greyhound bus are only 14" wide. *United States v. Felder*, 732 F.Supp. at 207. Whether the officers stand directly in the aisle or, as in this case, partly in the aisle and partly in the seat, easy egress is impossible.[5] A seated passenger could not simply walk away, but "would have required the permission of each of the officers to squeeze past them in the narrow aisles," *United States v. Cothran*, 729 F.Supp. 153, 158 (D.D.C. 1990).[6] Twiggy, let alone an average police officer, could not stand in aisles 14" wide without trapping a seated passenger.

Even if a passenger on one of these buses felt free to ask the officer to step aside, the passenger still could

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[4] (...continued)
of workers to move freely about within the factory, relied upon by this Court to find no seizure in *INS v. Delgado*, 466 U.S. 210 (1984), has no parallel within the confines of the narrow aisles of a bus.

[5] In some cases, the officers apparently stood slightly behind the passenger. Nonetheless,

> [i]n such a contained area, the officers were only steps away from being able to prevent the defendant's departure. A passenger who may be seized from behind before reaching the bus' only exit is likely to feel equally as trapped as one whose path to the exit is blocked.

United States v. Alston, 742 F.Supp. 13, 16 (D.D.C. 1990). The key is the perception of the reasonable passenger subject to these interdiction procedures.

[6] A similar point was made by the court in *Felder*, 732 F.Supp. at 206:

> [B]ecause Det. Hanson was blocking his path to the aisle, [the defendant] would have been unable to exit the bus without coming into physical contact with the officer unless Det. Hanson had turned sideways to allow the defendant to pass through the narrow aisle.

See also Avery, 531 So.2d at 196 (Anstead, J., dissenting)("the narrow aisles . . . are automatically 'blocked' merely by the presence of a police officer").

not readily leave. Here, as in many of these bus interdictions, the bus driver got off the bus and closed the bus door. His purpose may have been to keep others from boarding without tickets; an effect, of which the officers were surely aware, is to inhibit the passengers aboard from leaving. J.A. 52, 54. As the court below recognized, "[t]here was, in fact, no place to which a reasonable traveler might leave and no place to which he or she might walk away." 554 So.2d at 1157.[7] And, of course, if a passenger has luggage stored in the undercompartment of the bus, withdrawing from the confrontation by leaving the bus may mean losing his or her luggage. *See United States v Cothran*, 729 F.Supp. at 155.

Constraints of time as well as space inhibit the confronted passengers from leaving. The police time their interdictions program so that they are on the bus until departure time or even beyond. Frequently, officers wait until the passengers have reboarded and the bus is otherwise ready to leave before they even begin the interdiction process. *See, e.g., Rembert*, 694 F.Supp. at 163; *Avery*, 531 So.2d at 189 (Glickstein, J., concurring). In this case (and inevitably in many others), the bus is in fact delayed by the process. J.A. 52, 58-59.[8]

> [T]he police officers' presence on board right up until the time that the bus is ready to depart . . . mak[es] the passenger less likely to view exit and reentry onto the bus to be a reasonable

[7] Neither Mr. Bostick nor any other passenger should be reduced to hiding in the bathroom (*see* Brief for United States at 18, 20), in order to avoid an unwanted "encounter" with the police.

[8] The delay of the bus and all its passengers by the government, based on no articulable justification, interferes with the public's right to travel, a right long recognized as fundamental. *United States v. Fields*, 909 F.2d 470, 474 n.2 (11th Cir. 1990). *See also Aptheker v. Sec'y of State*, 378 U.S. 500 (1964); *Edwards v. California*, 314 U.S. 160 (1941).

alternative.

Avery, 531 So.2d at 196 (Anstead, J., dissenting).[9] Ordinary passengers do not feel free to outwait the police by sitting silently until the bus departs, *see* Brief for United States at 21; instead, they are likely to believe that the bus will not depart until the police have finished their business, especially when the driver waits outside while the officers carry out the interdiction.

This Court has properly defined the test for when a police-citizen confrontation becomes a Fourth Amendment stop in terms of reasonably perceived freedom of movement. Under this test, the Fourth Amendment is triggered whenever the situation "would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Chesternut*, 486 U.S. at 569. That impression is surely conveyed, and intentionally conveyed, by the sort of bus interdiction program at issue in this case. It is not by accident that the interdiction takes place on the bus rather than on the platform or the waiting room. Numerous scientific studies confirm that cramped spaces make people anxious and thus readier to assent to the

[9] *See also United States v. Cothran*, 729 F.Supp. at 155. In reviewing an analogous airplane seizure, the Sixth Circuit recently wrote:

> Citizens approached in an airport concourse retain the freedom to walk away from the officers; [the defendant] was approached by the agents after boarding and had no place to go but to remain on the plane.

United States v. Grant, Nos. 90-1397, 1398 (6th Cir. Dec. 3, 1990) (LEXIS, Genfed library, CtApp file) at 22 (footnote omitted).

Admittedly, a passenger "who *needed* to leave the bus," *Rembert*, 694 F.Supp. at 174 (emphasis added), might have felt able to do so; constitutional rights are infringed, however, if police create a situation in which one does not feel free to go on one's way for good reasons, bad reasons, or no reason at all.

requests of others.[10] To ignore an officer is rude.[11] It invites suspicion.[12] In short, we can characterize much police-citizen interaction as "a mere encounter" only because of the key factor missing here: the option of leaving.

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[10] *See, e.g.*, Albas & Albas, "Meaning in Context: The Impact of Eye Contact and Perception of Threat on Proximity," 129(4) J.Soc. Psychology 525 (1989)(people seek to increase personal space in situations perceived as potentially threatening); Strube and Werner, "Interpersonal Distance and Personal Space: A Conceptual and Methodological Note," 6(3) J. Nonverbal Behav. 163 (1982)(subjects seeking to avoid control by others chose to stand further away than those seeking to control others).

[11] Because interstate buses are crowded, with little personal space and highly restricted options for moving away, many people will seek to preserve as much felt privacy as possible by avoiding interactions with strangers. (Note, for example, how people avoid sitting next to strangers until a bus or waiting room is so full that this is unavoidable.) The officers' conduct in these interdictions thus qualifies as a seizure under Professor LaFave's interpretation of the *Mendenhall* test:

> conduct which a reasonable man would view as threatening or offensive even if performed by a private citizen [including] such tactics as . . . blocking the path of the suspect and encircling the path of the suspect.

3 W. LaFave, *Search and Seizure* §9.2(h) at 413-14 (2d ed. 1987).

[12] Police become suspicious when someone refuses to answer. *See* Pilcher, "The Law and Practice of Field Interrogation," 58 J.Crim. Law, Criminology And Police Science 465, 470 (1967). Although the Solicitor General properly states that "law enforcement officers may draw no inference . . . from a refusal to cooperate," Brief for United States at 25, in at least two reported cases officers testified that a refusal to cooperate "might be [deemed] suspicious" and might cause police to notify authorities at the next stop of their suspicions. *Cothran*, 729 F.Supp. at 156; *see also Felder*, 732 F.Supp. at 205. Such suspicions may well be communicated to the citizen, increasing the pressure to cooperate. In addition, if bus interdictions are not held to be seizures, there would be no effective constitutional protection against the hazard of being confronted again and again and again, at each rest stop.

The bus interdiction programs, as generally carried out, substantially inhibit the average passenger's felt ability to withdraw from the confrontation or otherwise to avoid compliance.[13] Furthermore, we must measure the intrusiveness of the program against the reaction of the reasonable person likely to be in the situation. Even excluding those whom hindsight proves to have been guilty, "the fear and surprise engendered in law abiding [bus passengers]" makes this practice a seizure. *Cf. Sitz*, 110 S.Ct. at 2486. It "is an intimidating and coercive situation in and of itself." *State v. Carroll*, 510 So.2d 1133, 1134 (Fla. 4th DCA 1987)(Glickstein, J., concurring).

The extent of felt coercion is even greater when we realize that bus passengers are disproportionately poor and minority.[14] These are the groups most likely to feel that it is not safe to ignore a police request.[15] It is, per-

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[13] Though some elements of the interdiction programs, such as the imminent departure of the bus that keeps people from deboarding, are part of the situation and not directly caused by the police, all the elements appear to be part of the police program. Police, in an unfettered and -- the state asserts -- unreviewable discretion, *choose* the time and place of these interdictions. They have created a confrontation under confined conditions when they clearly had other options. They cannot ask this Court to treat confined, cramped conditions as merely a background fact when it is part of their chosen policy, designed "to increase the psychological coercion." *People v. Evans*, 556 N.Y.S.2d 794, 800 (Sup.Ct. 1990). *Cf. Brower v. County of Inyo*, 489 U.S. ___, ___, 109 S.Ct. 1378, 1381 (1989)(government is responsible for a *willful* detention).

[14] *See* n.19, *supra*.

[15] *See Sitz*, 110 S.Ct. at 2493 (Stevens, J., dissenting):

> [T]hose who have found -- by reason of prejudice or misfortune -- that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior.

haps, worth noting that virtually all reported on-board random interdictions occur on buses and trains; police have not subjected first-class airline passengers to these intrusions.

Because bus interdictions are seizures, the searches that follow are as illegal as the unjustified seizure that precedes them. The "consent" to search in this and some of the other bus interdiction cases might, looked at in isolation, have been voluntary under the standard of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). It would, nonetheless, be impermissible as the direct and immediate fruit of the preceding illegal seizure. *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Berry*, 670 F.2d 583 (5th Cir. 1982)(*en banc*). There must be "clear and convincing proof of an unequivocal break in the chain of illegality," *Norman v. State*, 379 So. 2d 643, 647 (Fla. 1980), when consent is claimed to validate such a search. No such claim is possible, either in this case or in the other bus interdiction cases of which *amici* are aware.

C. A Prophylactic Rule Barring All Bus Interdiction Programs Is Both Necessary And Appropriate Under The Circumstances

Bus interdiction programs are not the sort of fluid, unpredictable police-citizen encounter for which the Court designed the flexible, case-by-case criteria of *Terry*. Rather, they are part of a carefully conceived program, properly subject to a prophylactic rule. Such programs are already in effect in Florida (*see, e.g., Fields*, 909 F.2d 470; *Bostick*, 554 So.2d 1153; *Avery*, 531 So.2d 182); the District of Columbia (*see, e.g., Felder*, 732 F.Supp. 204; *Cothran*, 729 F.Supp. 153; *Lewis*, 728 F.Supp. 784); and North Carolina (*see, e.g., United States v. Flowers*, 912 F. 2d 707 (4th Cir. 1990); *Rembert*, 694 F.Supp. 163). The procedures are essentially similar because they are copied one from another. *Id.* at 168 (North Carolina officer received special training in bus interdiction techniques from the Broward County Sheriff's Office).

Under these circumstances, a prophylactic rule is eminently practical. It is also appropriate and necessary to protect the large number of innocent bus passengers potentially subject to these interdictions. The reported cases, while only a fragmentary sample, indicate that bus interdictions are becoming an increasingly common occurrence and that large numbers of innocent passengers are being accosted and acceding to police requests to search their luggage. The officers in this case said that bus boarding was an everyday part of their duties, J.A. 5, 13, while in *State v Kerwick*, 512 So.2d 347, 349 (Fla. 4th DCA 1987), the judge found "that just one officer, Damiano, admitted that during the previous nine months, he, himself, had searched in excess of three thousand bags."

The choice of buses and of passengers is, or can be, entirely random.[16] The government, here as in the other bus interdiction cases, "concedes that it lacked any basis for suspecting illegal activity whatsoever," *Bostick*, 554 So.2d at 1158. Thus, we must assume that the vast majority of people subjected to this process, like any random group of citizens, carry no drugs or other contraband.[17]

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[16] At most, the police have occasionally claimed that "[t]heir practice was to look for people that [sic] appeared to be suspicious or unduly nervous." *State v. Carroll*, 510 So.2d at 1134 (Glickstein, J., concurring). More broadly, however, the government consistently asserts the authority to carry out bus interdictions without providing any constitutional justification.

[17] As stated in *Felder*, 732 F.Supp. at 209:

> At stake here are the rights of a large segment of our populace. While I realize that the drug epidemic is of tremendous proportions, it cannot be said that everyone who boards an interstate bus must be deemed a suspected drug

(continued...)

The Constitution forbids stops based on criteria that do not distinguish reasonably suspected lawbreakers from large numbers of innocent travelers. *Reid v. Georgia*, 448 U.S. 438, 441 (1980); *United States v. Miller*, 821 F.2d 546, 550 (11th Cir. 1987). It also protects those innocent travelers from a planned program of police harassment in the guise of a "mere" encounter. This situation, therefore, is exactly the context in which a prophylactic rule is appropriate. The value of a rule, enforced by the exclusionary remedy, is illustrated by the consequences of this Court's decision in *Prouse*, 440 U.S. 648: As soon as the decision was announced, police chiefs instructed their officers to cease the practice.[18]

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[17] (...continued)
courier.

The agent in *Rembert*, 694 F.Supp.at 168, testified that he had boarded 40-50 buses -- though he made only 3 or 4 narcotics arrests. The judge in *Flowers*, 912 F.2d at 710, found that during the prior year Officer Sennett had boarded approximately 100 buses, resulting in seven arrests. Bus interdictions are thus strikingly unlike police measures examined in prior cases, whose impact fell most substantially on those who were in fact the objects of the investigative technique. *See, e.g., Delgado*, 466 U.S. at 223 (Stevens, J., concurring)(20-60% of employees in factories subject to factory surveys were arrested); *United States v. Martinez-Fuerte*, 428 U.S. 543, 564 n.17 (1976)(20% of diverted cars contained undocumented aliens). Rather, they fit the pattern of *Prouse*, 440 U.S. at 660, in which the impact on crime prevention was "marginal at best" or the "symbolic" drug policies excoriated by Justice Scalia in *National Treasury Employees Union v. Von Raab*, 489 U.S. ___, ___, 109 S.Ct. 1384, 1398 (1989).

[18] *See* Kamisar, "Does (Did)(Should) The Exclusionary Rule Rest on a 'Principled Basis' Rather Than an 'Empirical Proposition'," 16 Creighton L.Rev. 565, 660-61 (1983); Mertens & Wasserstrom, "The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law," 70 Geo.L.J. 365, 399-401 (1981). This Court has long recognized the importance of the exclusionary rule in creating systematic deterrence. *See, e.g., James v. Illinois*, 493 U.S. ___, ___, 110 S.Ct. 648, 655 (1990); *Stone v. Powell*, 428 U.S. 465, 492-93 (1976).

Amici recognize that most Fourth Amendment law involves application of generalized standards, dependent on an assessment of "all the circumstances surrounding the search or seizure," *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). Accordingly, some issues are simply not amenable to a rule or rote formula, such as the definition of probable cause, *see, e.g., Illinois v. Gates*, 462 U.S. 213 (1983), or of reasonable suspicion, *see, e.g., United States v. Sokolow*, 490 U.S. ___, 109 S.Ct. 1581 (1989); *Florida v. Rodriguez*, 469 U.S. 1 (1984).

Whenever possible, however, the Court should and does try to establish rules to guide police and lower courts and to avoid the "unanalyzed exercise of judicial will." *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., dissenting). In *Arizona v. Hicks*, 480 U.S. 321 (1987), it reaffirmed the application of a bright-line test defining what constitutes a search. In *Minnesota v. Olsen*, 495 U.S. ___, 110 S.Ct. 1684 (1990), it rejected the prosecution's proposed 12-part test for legitimate expectations of privacy in favor of the simple rule that an overnight guest has such expectations. Here, too, the Court can and should create, within that broader question of what constitutes a seizure under *Terry* and *Mendenhall*, a small area of certainty.

Absent such a bright-line rule, police will remain essentially free to continue the practice of bus interdiction. In some cases, of course, the trial judge might agree to suppress any incriminating evidence on a fact-specific determination that the police behavior was a seizure. *See, e.g., Lewis*, 728 F.Supp. 784; *Avery*, 531 So.2d 182. Such occasional reversals, however, are unlikely to serve as an adequate deterrent and thus would not effectively protect the innocent passengers subjected to stops and searches.

> It must be realized that it is the law-abiding citizen who readily accedes to the policeman's "search" request to

> demonstrate that he has nothing to hide . . . . he should not be placed in the posture of having to deny those who are there to protect him.

Lewis, 728 F.Supp. at 790.

Such uncontrolled police power is particularly problematic because it involves unbounded discretion by the field officers in choosing which bus to board and which passengers to seek to search. Studies have suggested that such discretion may be exercised in a fashion that disproportionately affects minorities.[19] An abiding theme of this Court's Fourth Amendment jurisprudence is the concern with protecting citizens from unguided police discretion. *Compare South Dakota v. Opperman*, 428 U.S. 364 (1976)(inventory search according to standardized criteria constitutional), *with Florida v. Wells*, 495 U.S. ___, 110 S.Ct. 1632 (1990)(inventory search unconstitutional absent such criteria). *See also Prouse*, 440 U.S. 648; *Martinez-Fuerte*, 428 U.S. 543.

Though the constitutional rights of numerous innocent passengers have been infringed by the operation of bus interdiction programs, the dollar value of the infringement in each case is likely to be too small for effective civil remedies. Further, the typical bus passenger lacks the skills and resources to assert his or her legal rights aggressively.

> [S]uch means of transportation [as buses and trains] are utilized largely by the underclass of this nation who, because of greater concerns (such as being able to survive), do not often complain about such deprivations.

Lewis, 728 F.Supp. at 789. Here, perhaps more clearly than in many other contexts, it is apparent that the sort of prophylactic rule that *amici* propose is necessary to protect "innocent people by eliminating the incentive to search and seize unreasonably." Loewy, "The Fourth Amendment as a Device for Protecting the Innocent," 81 Mich.L.Rev. 1229, 1266-67 (1983).

D. The Public Interest In Controlling Drug Trafficking Is Adequately Protected Under A Constitutional Regime Subjecting Bus Interdiction Programs To Constitutional Controls

The Constitution forbids the government from carrying out the current bus interdiction programs. It leaves the government, however, with a wide array of other means, including searches based on articulable suspicion and consensual encounters in settings less inherently coercive than the cramped quarters of an interstate bus.

As previously noted, bus interdictions are Fourth Amendment stops because of the combined effect of the police activity and the setting in denying the average passenger the felt ability to walk away or otherwise break off the encounter. Those intense situational pressures do not exist in most other settings. "[T]he narrow aisles of interstate buses [do not] as readily as the broad corridors of an air terminal accommodate breaking off a gratuitous police encounter," *Avery*, 531 So.2d at 190 (Glickstein, J., concurring). The police may, on the other hand, seek the cooperation of passengers before

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[19] Murphy, "Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification," 1986 Ariz.St.L.J. 207; *see also* Greenberg, "Drug Courier Profiles, *Mendenhall* and *Reid*: Analyzing Police Intrusions on Less Than Probable Cause," 19 Amer. Crim.L.Rev. 49 (1981).

This concern is not entirely hypothetical. Insofar as the facts of the reported bus interdiction cases indicate, the defendants all appear to be Black or Hispanic. *See Lewis*, 728 F.Supp. at 786; *Felder*, 732 F. Supp. at 206; *Evans*, 556 N.Y.S. 2d 794. Police departments do not appear to keep records of the identity of the citizens in "unsuccessful" confrontations and searches. The evidence is at least suggestive, however, that police may be using their uncontrolled discretion in a racially biased manner. *See id.* at 796.

they board or after they leave the bus, subject only to a case-by-case determination, under established criteria, of whether a particular encounter has escalated into a seizure. *See, e.g., Rodriguez*, 469 U.S. 1; *Royer*, 460 U.S. 491; *Mendenhall*, 446 U.S. 544.

Even on buses, police may approach passengers, check their destinations and stories, and seek consent to search their luggage so long as they have a "reasonable suspicion [of wrongdoing], based on specific and articulable facts," *United States v. Hensley*, 469 U.S. 221, 226 (1985). The police officers do not need proof positive; they do not even need facts wholly inconsistent with innocence, so long as the factors, as perceived by a trained agent and later articulated to the judge, appear to have adequate evidentiary significance. *Sokolow*, 109 S.Ct. at 1587. Given the relatively low threshold this Court has created for justifying a seizure, a police force genuinely concerned with transportation of narcotics on interstate buses could institute an effective program that limited its intrusions to those passengers who were suspect under constitutionally established criteria.[20] *Cf.*

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[20] Even under the balancing test utilized in *Sitz*, 110 S.Ct. 2481, a bus interdiction plan would have to "embody[] explicit, neutral limitations on the conduct of individual officers," *Brown v. Texas*, 443 U.S. 47, 51 (1979). Current drug interdiction programs provide *no* limits on an officer's choice of target.

> This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed.

Prouse, 440 U.S. at 661.

This is, moreover, a particularly inappropriate context for allowing a program of stops without individualized suspicion. One reason a controlled program of sobriety checkpoints may be permissible is because we "assume that . . . officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class, (continued...)

Prouse, 440 U.S. at 659 ("[g]iven the alternative mechanisms available . . . we are unconvinced that the incremental contribution of the random [interdictions] justifies the practice").

This Court has long recognized that Fourth Amendment rights

> belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual, and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.

Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973), *quoting Brinegar v. United States*, 338 U.S. 160, 180 (1948)(Jackson, J., dissenting).

In our zeal to control drugs, we must not forget the Constitution, and we should not "transform this free society into one where travelers must present papers or proffer explanations to be on their way," *Flowers*, 912 F.2d at 712. The program under review seizes large numbers of innocent travelers; it is an "immolation of privacy and human dignity in symbolic opposition to drug use." *National Treasury Employees Union*, 109 S.Ct. at 1398 (Scalia, J., dissenting). It cannot and should not be upheld under the Fourth Amendment.

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[20] (...continued)
Martinez-Fuerte, 428 U.S. at 559. "[T]he breadth of the class subject to [a checkpoint-like] search helps mitigate the barriers to an effective political check on unproductive programs." Schulhofer, *supra* at 110. Transient bus passengers lack such political effectiveness.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the judgment of the Supreme Court of Florida in this case should be affirmed.

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